No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,
PETITIONER,

v.

WAYFAIR, INC., OVERSTOCK. CO, INC.
AND NEWEGG, INC.
RESPONDENTS.

On Writ of Certiorari
to the Supreme Court of South Dakota

AMICUS CURIAE BRIEF OF FOUR UNITED STATES SENATORS IN SUPPORT OF PETITIONER

DARIEN SHANSKE
UC DAVIS SCHOOL
OF LAW
400 MRAK HALL DRIVE
DAVIS CA 95616
(530) 752-5860
dshanske@ucdavis.edu

ALAN B. MORRISON
COUNSEL OF RECORD
THE GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL
2000 H STREET NW
Washington, DC 20052
(202) 994-7120
abmorrison@law.gwu.edu

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INTEREST OF THE AMICI CURIAE[1]

Amici are four United States Senators who support petitioner in urging this Court to overturn its decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Heidi Heitkamp is a United States Senator from North Dakota, Lamar Alexander is a United States Senator from Tennessee, Richard Durbin is a United States Senator from Illinois, and Michael Enzi is a United States Senator from Wyoming. Two are Democrats, and two are Republicans. Senator Heitkamp previously served as the State of North Dakota's Tax Commissioner and represented the State of North Dakota in *Quill*. Amici, as Senators, maintain a vital interest in the laws affecting their states' ability to assess and collect sales and use taxes by state and local governments. They are among the co-sponsors of S. 976, the Marketplace Fairness Act of 2017 as well as other versions of that bill in prior Congresses.

The States which amici represent have sales and use taxes that this Court's decision in *Quill* prevents them from enforcing. It is estimated that, as of 2015, total sales and use taxes uncollected because of *Quill* amounted to almost $26 billion annually.

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[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than amici and their counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

Not only does *Quill* cause a loss in revenue to their States, but it also places merchants with physical locations in their States at an economic disadvantage because they must, in effect, charge a higher price for a product also sold by an out-of-state retailer that does not have to collect a tax that is imposed on in-state buyers and must be collected by in-state sellers. States that amici represent - Illinois, North Dakota, Tennessee, and Wyoming - rely heavily on state sales taxes for revenue. When respondents make sales there, they have a price advantage over businesses with a physical presence there of up to 11% in Illinois, 8.5% in North Dakota, 9.75% in Tennessee, and 6.0% in Wyoming, simply because they cannot be required to collect those State taxes.

Amici are filing this brief to demonstrate that overturning *Quill* will not leave respondents and other out-of-state sellers without a Dormant Commerce Clause defense and to assure the Court that Congress stands fully prepared to step in if other states or localities, unlike South Dakota, seek to impose excessive burdens on out-of-state retailers that become obligated to collect sales and use taxes.

SUMMARY OF ARGUMENT

Amici agree with petitioner that the physical presence rule established by *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), should be overturned. As Justice Kennedy has explained, the decision was "questionable even when decided, [and] now harms States to a degree far greater than could have been anticipated earlier." *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring). This Court does not overturn precedent lightly, but, again as Justice Kennedy concisely indicated, and petitioner has demonstrated at length, the rule established by *Quill* satisfies all of the criteria this Court has established for when it is appropriate to overturn a precedent.

This brief also addresses the important question of what will happen if this Court overturns *Quill*. There is no doubt that the respondents and their amici will argue that vast confusion will ensue if the states are freed from the bright-line rule of *Quill*. That will not happen for (at least) three reasons. First, there is little evidence that the states would rush to enact a welter of burdensome use tax collection laws and much evidence to the contrary. Furthermore, the same technological innovations that have made the adverse impacts of the *Quill* rule so problematic for States like South Dakota have also driven down the cost of compliance, thereby

reducing the likelihood that state laws can impose significant costs on remote sellers.

Second, should this Court overturn the physical presence rule established in *Quill*, that does not mean that this Court, or courts generally, will not be able to protect interstate sellers. There are a number of doctrines that remain to guard against potential abuses. First, should a state or locality impose obligations on remote sellers that do not apply to local vendors, then such laws are virtually per se invalid. Second, should a state or locality impose financially significant obligations on remote sellers, then *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), adequately protects them if the "burden imposed [by state laws] is clearly excessive in relation to the putative local benefits."

Third, Congress is standing by to act should states overstep. The *Quill* rule reversed the default set up by the Constitution under which states are free to act as sovereigns unless Congress acts. If *Quill* is overturned and the constitutional default restored, amici believe that Congress is fully prepared to act, especially if the problem to be solved is overreaching by a few states or by certain local tax schemes that collectively place excessive burdens on out-of-state sellers. Furthermore, with the *Quill* tax shelter no longer available, all the states and interstate sellers will favor establishing standard rules of practice in order to facilitate orderly and efficient

revenue collection. In this regard, it is notable that commercial interstate interests have had considerable success in persuading Congress to pass balanced laws that have served to streamline their interactions with state and local revenue authorities while protecting legitimate state interests.

ARGUMENT

THE JUDGMENT BELOW SHOULD BE REVERSED.

I. The Physical Presence Rule of Quill Should Be Overturned.

Amici will be brief in explaining why this Court should overturn the *Quill* physical presence rule. We wholly concur with the arguments made by petitioner and agree that, properly applied, the South Dakota statute at issue here satisfies the "substantial nexus" prong of the four-part test established by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). As this Court explained in *Quill*, "the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." 504 U.S. at 312. The South Dakota statute only applies to remote sellers with substantial economic contact with the state and goes to considerable length to mitigate their

compliance burdens. Respondents and other remote sellers therefore have a substantial nexus with South Dakota such that the State is not imposing an undue burden on the national economy.

Although the Court in *Quill* asserted that the four prong test of *Complete Auto* applied, the Court in *Quill* did not proceed to analyze the use tax collection obligation under all of its prongs. Some of the prongs do not seem relevant to a regulation such as the one at issue in this case, which indicates that the *Complete Auto* test itself is not the correct rubric. Take the "fair apportionment" prong of *Complete Auto*. This prong asks whether the taxpayer can demonstrate that "there is no rational relationship between the income attributed to the State and the intrastate values of the enterprise, by proving that the income apportioned to [the taxing State] under the statute is out of all appropriate proportion to the business transacted in that State," *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 180–81 (1983) (internal quotation marks and citations omitted).

This test is vitally important for assessing the constitutionality of a state corporate income tax, where the issue is fair division among states. However, it makes little sense in analyzing a use tax collection law, such as South Dakota's, under which the seller is either obligated to collect the entire tax or not. Neither the South Dakota law

at issue in this case, nor the North Dakota law at issue in *Quill*, attempts to divide income or any other kind of tax. They are simply attempts to impose a collection requirement on certain interstate vendors.

The fact that the bright line physical presence rule mandated by *Quill* would alone render this statute unconstitutional is a clear indicator that this rule does not attempt to strike a proper balance between reasonable efforts by states to collect revenue and the importance of not overburdening the national economy. To the contrary, the *Quill* rule is inequitable, arbitrary, inefficient, and inconsistent with our federal system. The rule is inequitable because it grants a tax advantage to certain remote sellers. As Justice White observed in his dissent in *Quill*, the majority "creates an interstate tax shelter for one form of business — mail-order sellers — but no countervailing advantage for its competitors." 504 U.S. at 329.

The rule is arbitrary because a small remote seller with a physical presence must collect the tax, while a large seller organized so as to avoid physical presence can avoid any use tax collection obligation. The rule is inefficient because it wastes the resources of out-of-state sellers as they contort themselves to avoid physical presence and at the same time diverts the resources of taxing agencies as they seek to demonstrate a physical presence, or, as happened in Colorado, enact a second-best reporting law

designed to minimize the adverse impact of *Quill*. *See Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir.), *cert denied*, 137 S.Ct. 591 (2016).

The *Quill* rule is also inconsistent with our federal system, by creating a tax advantage for remote businesses granted by this Court – and not by Congress. To be sure, and as this Court recognized in *Quill*, Congress has the power to take this advantage away. Yet the Founders deliberately organized our federal government in a manner that makes it difficult for Congress to act. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983) ("With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."). Therefore, this Court's decision in *Quill* placed the states at a structural disadvantage whereby it is *they* that have to appeal to Congress to have their taxing power restored.

This is the reverse of the constitutionally designed balance where the states, as sovereigns, retain the power to act unless Congress, designed to be resistant to change, affirmatively acts to preempt state action. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1371 (2001):

> [F]ederal lawmaking procedures continue to preserve state prerogatives to some

> extent by 'impos[ing] burdens on governmental processes that often seem clumsy, inefficient, even unworkable.' In short, the "gridlock" still decried today frequently prevents the federal government from adopting 'the supreme Law of the Land,' thus leaving states free to govern. (internal citation to *Chadha* supra).

It is particularly perverse for the states to be required to appeal to Congress for restoration of their taxing power given what this Court has described as a "strong background principle against federal interference with state taxation." *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 589 (1995).[2]

Finally, the *Quill* rule has had significant adverse economic consequences for states like South Dakota. The doctrinal misadventure represented by *Quill* has prevented states from collecting the use tax from a vast and growing segment of commercial activity. Not only has the *Quill* rule cost the states millions in lost use tax revenue, but it has hurt their in-state business through the tax advantage that the *Quill* rule

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[2] The holding of *National Private Truck Council* illustrates the strength of this principle. There the Court held that 42 U.S.C. § 1983 did not authorize injunctive or declarative relief in state court for tax cases when there is an adequate remedy at law. *Nat'l Private Truck Council*, 515 U.S. at 592. On its face, Section 1983 does not contain any such subject area limitation, but this Court unanimously found one nevertheless.

conferred on remote vendors who can charge a "tax free" price for the same product for which local vendors must raise the price in order to collect the tax.

II. It is Improbable that Undue Burdens on Interstate Commerce Will Develop if the Physical Presence Rule is Overturned.

Respondents will argue that the physical presence rule is justified because anything other than this bright-line rule would prove too burdensome for remote vendors. As to most vendors, this fear is impossible to square with common sense or experience. Why would states want to make it difficult for vendors to collect and remit the taxes owed to them? The whole reason that states impose the use tax collection obligation is because it is extremely difficult for them to collect the tax from each individual buyer without that obligation.

This logic applies to imposing the collection obligation on small vendors as well. It is small vendors who could most plausibly suffer excessive harm from use tax collection obligations in multiple jurisdictions. But it is highly unlikely that states will spend valuable enforcement resources to collect the small amounts of tax that small vendors should remit. Indeed, this very case shows that the fear of burdening small vendors is a myth generated by large retailers in the hope of keeping their sales tax cost advantage. South Dakota's statute applies only to vendors who have at least 200 transactions with in-state customers

or who have generated more than $100,000 of sales with them.[3] Indiana, Maine, North Dakota, Vermont, and Wyoming have adopted those same thresholds.[4] Other states have adopted or proposed even higher threshold amounts.[5] And there is no reason to think that in a post-*Quill* era, fair and sensible legislators will suddenly amend their laws to create burdens on collecting the use tax money that they need to fund their programs.

It could perhaps be imagined that a state might have some incentive to make it more difficult for remote sellers so as to advantage domestic sellers, but this scenario is improbable. The use tax is a complement to the sales tax. States already have significant incentives to make their sales tax collection systems as user-friendly as possible for their domestic firms. All the states are essentially asking for in this case is to restore the power to compel remote sellers to utilize the same systems as domestic sellers in order to remit the use taxes validly owed to the states.

Finally in note 6 in *Quill*, this Court cited the fact that there are 6000 taxing jurisdictions in the United States, suggesting that each of them might impose unique and perhaps complex tax

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[3] S.D. Codified Laws § 10-64-2.

[4] Ind. Code § 6-2.5-2-1(c) (Indiana); Me. Rev. Stat. Ann. tit. 36, §1951-B (Maine); N.D. Cent. Code Ann. § 57-39.2-02.2 (North Dakota); Vt. Stat. Ann. tit. 32, § 9701(9)(F) (Vermont); Wyo. Stat. Ann. § 39-15-501 (Wyoming).

[5] *See, e.g.*, Ala. Admin. Code 810-6-2-.90.03 (adopting a sales threshold of $250,000).

collection obligations on out-of-state sellers but for the physical presence rule. 504 U.S. at 313. However, such large numbers do not matter very much when technology can easily accommodate thousands of jurisdictions. Further, there is another reason such large numbers should not be taken at face value. In the majority of states that permit local sales taxes, those taxes piggyback on the state sales tax in substantial ways.[6] For states that are members of the SSUTA, there is a requirement that state and local taxes be harmonized. Streamlined Sales and Use Tax Agreement § 302. For states that are not members of the SSUTA, there is often substantial state authority over local sales tax regimes. Moreover, in order to prevent challenges under the Dormant Commerce Clause and forestall Congressional action over state collection authority, states will have a significant incentive to prevent excessive local variance.

III. Courts are Capable of Preventing an Undue Burden on Interstate Commerce.

This case and *Quill* before it are about a state law that imposes a use tax collection obligation on small out-of-state sellers. Although

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[6] *See* Scott Drenkard, *State and Local Sales Tax Base Conformity Issues in Other States*, Tax Foundation (Oct. 28, 2015), https://taxfoundation.org/state-and-local-sales-tax-base-conformity-issues-other-states/. ("Louisiana is one of just a few states that have local sales tax bases, collections, and audit functions which are separate from the state. By our count, just five states other than Louisiana have unique situations in this regard: Alaska, Arizona, Colorado, Idaho, and New Jersey.").

improbable for the reasons adduced above, amici understand that such obligations could provoke the question as to whether they are excessively burdensome relative to their benefits. Although some states other than South Dakota currently have significantly lower thresholds, e.g., $10,000, a decision upholding South Dakota's much higher limits should cause those states to re-think their thresholds.[7]

In the absence of *Quill*, should such questions arise, the courts are capable of preventing undue burdens on interstate commerce. They could do that by applying existing jurisprudence, in particular the test articulated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (internal citations omitted:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found,

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[7] *See* Brief for Tax Foundation as Amicus Curiae Supporting Petitioner on Petition for Writ of Certiorari at 6-17, South Dakota v. Wayfair, Inc., No. 17-494 (Nov. 2, 2017) (containing a summary of thresholds, including several that are lower than South Dakota's, particularly for so-called "click through nexus" statutes.)

> then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

This is the test that is used to consider whether a facially neutral law, such as one imposing safety measures or affirmative disclosure requirements on a dangerous product, nevertheless imposes undue burdens on interstate commerce.[8]

Classic examples of state laws struck down by this Court for failing this kind of balancing include: an Illinois law requiring that trucks use a certain kind of mudguard that was in conflict with the requirements of other states;[9] an Arizona law forbidding the transport of uncrated cantaloupes (and hence they could not be packaged out-of-state);[10] and a city ordinance that required milk to be pasteurized within five miles of the city, thereby creating an "undue burden" on both in-state and out of-state milk processors.[11]

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[8] Although many areas today are preempted by federal statutes and regulations, states do still impose many such obligations, much as they create product liability torts.

[9] *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 522-23 (1959).

[10] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 138 (1970).

[11] *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 350-53 (1951).

The *Pike* balancing test is an appropriate way to determine the validity of the South Dakota law because the heart of respondents' legitimate concern is not that states will – or are likely to - facially discriminate against interstate commerce by imposing onerous use tax collection obligations only on out-of-state sellers. Rather, the concern is that neutral laws would nonetheless impose excessive burdens on those sellers, as this Court illustrated in footnote 6 of *Quill*, 504 U.S. at 313:

> North Dakota's use tax illustrates well how a state tax might unduly burden interstate commerce. On its face, North Dakota law imposes a collection duty on every vendor who advertises in the State three times in a single year. Thus, absent the *Bellas Hess* rule, a publisher who included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State, all would be subject to the collection duty.

Application of *Pike* balancing is in fact called for by the *Quill* decision itself. The *Quill* majority recognized that the law at issue was a regulation of business – not a tax - and yet slid into analyzing the North Dakota law at issue as if

it were a tax. *Compare id.* at 303 ("Quill has taken the position that North Dakota does not have the power to compel it to collect a use tax from its North Dakota customers.") *with id.* at 311 (analyzing law at issue under the first prong of the *Complete Auto* test) *see also id.* at 313 n.6 (*Quill* majority twice uses the notion of an "undue burden" as a touchstone for what the substantial nexus prong of *Complete Auto* forbids).

Amici accept the possibility that a clearly excessive burden on interstate commerce relative to the local benefit is possible and that sellers who object to these laws should have the opportunity to present evidence that they impose such a burden. Although amici believe that respondents here should have a chance to prove their contentions, amici also believe the respondents' prima facie case for demonstrating an excessive burden in this case appears quite weak.[12]

First, unlike in the cases where a state law has failed *Pike* balancing in part because the benefits sought were minimal, the use tax collection laws at issue clearly serve at least two important and non-discriminatory state purposes: the inability to collect the use tax is (1) depriving

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[12] Indeed, the Tax Foundation, often a critic of state taxing power, in its amicus brief urging this Court to take this case argued that this Court could and should rule in favor of the South Dakota statute without remand. Brief for Tax Foundation as Amicus Curiae in Support of Petitioner on Petition for Writ of Certiorari at 2, South Dakota v. Wayfair, Inc., No. 17-494 (Nov. 2, 2017).

the state of a large and growing amount of revenue; and (2) causing a competitive harm to in-state businesses, which collect sales and use taxes and are also likely to contribute to the state economy in other ways. Both of these costs have been quantified, and both are large and growing. There is therefore a weighty interest on one side of the scale.

Second, on the burden side, there are many reasons that any burden is not likely "clearly excessive." First, sales and use tax laws of the various states typically resemble one another so that complying with one is unlikely to be more difficult than complying with others like South Dakota's. *See* Walter Hellerstein et al., *State and Local Taxation: Cases and Materials* 650 (10th ed. 2014) (observing that "state sales taxes display significant common features and generally operate in a uniform manner. . ."). Second, twenty-three states, including South Dakota, belong to the Streamlined Sales and Use Tax Agreement, which means these state laws have been simplified and the states have harmonized their sales and use tax laws.[13] Third, the technology to comply with multiple use tax collection obligations is readily available and, for states that have joined the Streamlined Sales and Use Tax

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[13] Brief for Streamlined Sales Tax Governing Board, Inc. as Amicus Curiae Supporting Petitioner on Petition for Writ of Certiorari at 1-3, South Dakota v. Wayfair, Inc., No. 17-494 (Nov. 2, 2017).

Agreement, it is free.[14] The availability of this technology ought to relieve the burdens on most firms of complying with the law in non-SSUTA states. Fourth, as for smaller companies for whom the compliance costs might still loom large, South Dakota and other states have thresholds that will shield occasional sellers from a collection obligation. Fifth, sales and use tax laws often permit a vendor to retain a small portion of the tax collected as compensation for collecting the tax on behalf of the state. *See* Federation of Tax Administrators, State Sales Tax Rates And Vendor Discounts (Jan. 2018), https://www.taxadmin.org/assets/docs/Research/Rates/vendors.pdf (reporting that 28 states make provision for vendor compensation).

Finally, the *Pike* balancing test also asks a court to consider whether a state could adopt a regulation that would promote its legitimate local purpose "as well with a lesser impact on interstate activities." 397 U.S. at 142. State efforts to impose information reporting requirements and other regulatory measures, while helpful in collecting use taxes, have not been, and are not expected to be, completely successful.[15]

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[14] *Id.* at 12-13.

[15] For a survey of state approaches and their limitations, see Brief for Colorado et al. as Amici Curiae Supporting Petitioner on Petition for Writ of Certiorari at 7-14, *South Dakota v. Wayfair Inc.*, No. 17-494 (Nov. 2, 2017). Colorado's new information reporting requirement is expected, at best, to close 60% of its use tax collection gap. *Id.* at 8.

It is possible that some states may have some combination of a particularly burdensome collection regime, with a particularly low (or no) threshold and with low (or no) vendor compensation or provided software. In such a case the law might fail *Pike* balancing. But the opportunity for a particular out-of-state seller to demonstrate such a failure is a further reason to *support* the overruling of *Quill*, not one to perpetuate it. After all, under current law, a small vendor dealing with such a challenging state will have to collect the use tax if it has even a small physical presence.

In sum, the physical presence rule established in *Quill* was a bright-line rule that indicated whether or not an interstate seller had substantial nexus with a state. With the overturning of the *Quill* rule, the courts are capable of preventing an undue burden on interstate commerce by applying existing jurisprudence. Should the Court establish which test hereafter courts should apply, amici note that the *Pike* balancing test has already been developed in the case law and is appropriately deferential to state action. Applied to the facts of this case, it seems very unlikely that the respondents can prevail, but they – and someday other remote vendors – should be given the opportunity.[16]

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[16] As a leading treatise writer summarizes the cases, "[w]hile the vast majority of *Pike* claims fail, plaintiffs

IV. Congress is Fully Prepared to Act When Needed.

It is of course possible that the various state and local tax systems will impose a significant, but perhaps not unconstitutional, burden on interstate commerce. In that case, Congress is the appropriate source of relief. Congress has the means to collect evidence and to craft narrow solutions, as well as the ability to revise its approach in light of new evidence. Beyond addressing any problems that might emerge, amici believe that, once freed from the shackles of *Quill*, Congress is fully prepared to step in when needed, an outcome that virtually all parties, including amici, agree would be the best outcome.

Attached as an addendum to this brief is a history of the principal, and so far not yet brought to fruition, efforts in Congress from 2001-2017 to secure passage of legislation to overrule *Quill*. Given this history, one might ask what chance there would be for Congress to step in to overturn unreasonable state laws that are enacted after

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occasionally prevail . . ." Boris Bittker & Brannon P. Denning, *Bittker on the Regulation of Interstate and Foreign Commerce* § 6.05 (2d. ed. 2012 & Supp. 2017) (listing categories of cases in which plaintiffs occasionally prevail). For instance, unusual local labeling regimes can fail, *Pike* balancing, *Kraft Foods N. Am., Inc. v. Rockland Cty. Dep't of Weights & Measures*, 2003 WL 554796 (S.D.N.Y. Feb. 26, 2003), as can a facially neutral permitting procedure that favors incumbents, *Florida Transp. Servs., Inc. v. Miami-Dade Co.*, 703 F.3d 1230 (11th Cir. 2012).

this Court removes the *Quill* barrier. The answer is that, if Congress believes action is needed to address undue burdens, there is an excellent chance – and rightfully so. The Commerce Clause is supposed to – and does – empower the national Congress to intervene to foster interstate commerce if some states create undue burdens in their use tax collection programs. There are many examples of such targeted interventions.

For instance, in 1959, this Court decided *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). One possible interpretation of this decision (and others) was that it broadened the customary rules for corporate income tax nexus by allowing a state to tax "a company whose only contacts with a State consisted of sending 'drummers' or salesmen into that State . . ." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 221 (1992). Congress quickly passed Public Law 86-272, 73 Stat. 555, 15 U.S.C. § 381 (1959), in response to that broad reading of *Northwestern States*. In general terms, this law prohibits states from imposing a net income tax on a business whose *only* contact with a state is solicitation. Thus, Congress left in place a broad nexus rule, but acted to protect a discrete set of businesses from being overburdened.

Another important example involves the "fairly apportioned" prong of *Complete Auto*. In the corporate income tax context, for example, this

prong requires that a state use a reasonable formula to estimate what share of a multistate corporation's income is produced within the state. In *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175 (1995), the question was how this rule applied to the sales tax imposed on a bus trip between states. Oklahoma sought to tax the entire value of the transaction, even though only a portion of the trip took place in state. This Court held that the requirement of apportionment does *not* apply to a transactional tax like the typical state retail sales tax. Less than eight months later, Congress passed The Interstate Commission Termination Act, 49 U.S.C. § 14505 (1995), which overturned the specific holding of *Jefferson Lines* by prohibiting a state from "levy[ing] a tax . . . on . . . a passenger traveling in interstate commerce by motor carrier." Although Congress acted to shield interstate carriers from the imposition of taxes on interstate travel, Congress did not overturn the broad principle established by the Court in *Jefferson Lines* that sales taxes need not be apportioned.

Most relevant for current purposes is the example of the Mobile Telecommunications Sourcing Act of 2000 (MTSA), 4 U.S.C. §§ 116-24, which established a uniform rule for state and local taxation of mobile telephone calls.[17] The MTSA was in large part a response to this Court's decision in *Goldberg v. Sweet*, 488 U.S. 252 (1989),

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[17] 4 U.S.C. § 117(b).

which provided a narrow nexus test for whether a state can tax an interstate phone call, a test that was overtaken by the rapid development of mobile phones. Both the states and commercial interests supported sensible national standards, and the resulting federal law has won praise as "a poster child for horizontal federal-state tax coordination at its best." *Hearing on Tax Reform: What it Means for State and Local Tax and Fiscal Policy Before the S. Comm. on Fin.*, 112th Cong. 14-16 (2012) (statement of Walter Hellerstein, Federal-State Tax Coordination: What Congress Should or Should Not Do, http://digitalcommons.law.uga.edu/fac_artchop/762.)

Other examples of targeted Congressional interventions to limit state taxing power in favor of interstate commerce abound. For example, Congress restricts the states from taxing the internet directly,[18] from taxing individuals "traveling in air commerce"[19] and from imposing any tax that discriminates against railroads.[20] And Congress has permitted states to tax interstate motor fuels only if they are members of the International Fuel Tax Agreement.[21]

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[18] Internet Tax Freedom Act, Pub. L. No. 105–277, § 1100, 112 Stat. 2681-719 (1998) (made permanent in Pub. L. No. 114–125, § 922(a), 130 Stat. 281, on February 24, 2016 (codified at 47 U.S.C. § 151 note).

[19] 49 U.S.C. § 40116(b).

[20] 49 U.S.C. § 11501(b)(4).

[21] 49 U.S.C. § 31705(a).

In sum, this Court's decision in *Quill* put the onus on Congress to pass a law that would broadly restore the power of the states to collect use taxes from out-of-state sellers. It has been twenty-five years, and Congress has not been able to do so. By contrast, Congress has been able to act often, and even expeditiously, to protect interstate commerce, by passing narrow laws, to deal with specific problems. Amici are fully confident that Congress would do so again if, contrary to reasonable expectations, some states abused their powers in the post-*Quill* era.

CONCLUSION

For the foregoing reasons, in addition to those in the brief of petitioner, the judgment should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

Alan B. Morrison
Counsel of Record
George Washington
University Law School
2000 H Street NW
Washington D.C. 20052
(202) 994-7120
abmorrison@law.gwu.edu

Darien Shanske
UC Davis School of Law
400 Mrak Hall Drive
Davis CA 95616
(530) 752-5860
dshanske@ucdavis.edu

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ADDENDUM

MARKETPLACE FAIRNESS TIMELINE

107th Congress (2001-2002)

S. 512, Internet Tax Moratorium and Equity Act
Senator Byron Dorgan - introduced 3/9/2001
Referred to: Senate Finance
Finance Committee hearing – 8/1/2001

S. 1542, Internet Tax Moratorium and Equity Act
Senator Michael Enzi – introduced 10/11/2001
Referred to: Senate Commerce

S. 1567, Internet Tax Moratorium and Equity Act
Senator Michael Enzi – introduced 10/18/2001
Referred to: Senate Commerce

Senate Amdt. # 2156 to H.R.1552
Motion to table amendment was agreed to – 57-43 on 11/15/2001

108th Congress (2003-2004)

S. 1736, Streamlined Sales and Use Tax Act
Senator Michael Enzi - introduced 10/15/2003
Referred to: Senate Finance

109th Congress (2005-2006)

S. 2152, Sales Tax Fairness and Simplification Act
Senator Michael Enzi - introduced 12/20/2005
Referred to: Senate Finance

S. 2153, Streamlined Sales Tax Simplification Act
Senator Byron Dorgan - introduced 12/20/2005
Referred to: Senate Finance

Senate Finance Subcommittee on International Trade hearing on sales tax fairness and other state/local tax issues – 7/25/2006

110th Congress (2007-2008)
S. 34, Sales Tax Fairness and Simplification Act
Senator Michael Enzi - introduced 5/22/2007
Referred to: Senate Finance

Senate Commerce Committee hearing on "Communications, Federalism, and Taxation" where it was discussed – 5/23/2007

111th Congress (2009-2010) - No bill introduced

112th Congress (2011-2012)
S. 1452, The Main Street Fairness Act
Senator Dick Durbin - introduced 7/29/2011
Referred to: Senate Finance

S. 1832, The Marketplace Fairness Act
Senator Michael Enzi – introduced 11/9/2011
Referred to: Senate Finance

11/30/2011 – House Judiciary Committee hearing on "Constitutional Limitations on States' Authority to Collect Sales Taxes in E-Commerce."

1/31/2012 – Official letter requesting Finance Committee hearing on S. 1832

4/25/2012 – Senate Finance Committee hearing on state and local tax issues, including S. 1832

8/1/2012 – Senate Commerce Committee hearing on Marketplace Fairness: Leveling the Playing Field for Small Business

11/29/2012 – S. Amdt. 3223 filed to the National Defense Authorizations Act

113th Congress (2013-2014)

S. 336, The Marketplace Fairness Act
Senator Michael Enzi - introduced 2/14/2013
Referred to: Senate Finance

3/21/2013 – S. Amdt. 578 (Enzi 2nd Degree S. Amdt. #656) – Deficit Neutral Reserve Fund enabling Congress to pass the Marketplace Fairness Act
Senate Record Vote # 62 - Enzi Amendment agreed to 75 to 24
S. 743, Marketplace Fairness Act of 2013 (revised)
Senator Michael Enzi – introduced April 16, 2013
Referred to: Senate Finance

05/06/13 – S. 743 was passed by the Senate in a vote of 69 to 27

S. 2609, Marketplace and Internet Tax Fairness Act
Senator Michael Enzi – introduced July 15, 2014
Referred to: Senate Finance
March 2014: Hearing entitled "Exploring Alternative Solutions on the Internet Sales Tax Issue" before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary.

114th Congress (2015-2016)
S. 698, Marketplace Fairness Act of 2015
Senator Michael Enzi – introduced March 10, 2015
Referred to: Senate Finance

H.R. 2775, Remote Transactions Parity Act of 2015
Congressman Jason Chaffetz – introduced June 15, 2015
Referred to: House Subcommittee on Regulatory Reform, Commercial and Antitrust Law

115th Congress (2017-2018)
S. 976, Marketplace Fairness Act of 2017
Senator Michael Enzi – introduced April 27, 2017
Referred to: Senate Finance

H.R. 2193, Remote Transactions Parity Act of 2017
Representative Kristi Noem – introduced April 27, 2017
Referred to: House Subcommittee on Regulatory Reform, Commercial and Antitrust Law